In The
Supreme Court of The United States

OCTOBER TERM, 1941

No. 46

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

E. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER,

vs.

MOTOR BOAT SALES, INCORPORATED

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

THE HOLLAND CO., PRINTERS, STAUNTON, VA.

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E. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER,

vs.

MOTOR BOAT SALES, INCORPORATED

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays this honorable Court to rehear, reconsider and reverse its opinion and decision handed down herein on December 8, 1941, reversing the unanimous opinion and decision of the Circuit Court of Appeals of the Fifth Circuit of the United States, rendered on the same evidence,

under the same Federal statute and the former decisions of this court, for the following reasons:

I.

After a most careful study of your decision and its far-reaching effect and the inferences drawn therein, it is believed that it is without substantial evidence to support it and is contrary to the uncontradicted testimony and the indisputable character of the evidence, and is probably in conflict with the former decisions of this Court on the same question, construing the same Federal statute, and with the great weight of authority, and the Longshoremen and Harbor Workers' Compensation Act, its intent, purpose and scope, in the following particulars:

1. In holding that the contract of employment entered into between the employer and the employee and the instructions given him by his employer are not fundamental or jurisdictional and that proof of compliance therewith by an employee is not a condition precedent to giving effect to the statutory scheme set out in the Longshoremen's and Harbor Workers' Compensation Act, and that a deputy commissioner of the United States may make an award of "compensation or damages" against an employer predicated upon the employee's violation of his contract of employment and disobedience of his instructions in going on navigable waters, and thereby getting drowned at a place where he was not employed, ordered, requested or required to go or be by his employer or by any one having authority from him to do so.

2. In holding under the Longshoremen's and Harbor Workers' Compensation Act that the question of the jurisdictional fact of whether or not Armistead was employed in "maritime" employment and was at a place where he had not been employed, ordered, requested, directed or required to be when drowned, was for the determination of the deputy commissioner and not of the courts.

3. In holding that the finding of the deputy commissioner that Armistead was an employee in "maritime" employment and was at a place where he had been employed, directed or requested and required to be and was "acting in the course of his employment" were supported by substantial evidence (Op., p. 2, par. 1), and that the fact that he was riding in a boat on a navigable river at the time he was drowned was of itself sufficient to establish his "maritime activities" and support the award. (Op., top p. 3.)

4. In holding that the finding of the deputy commissioner that the claim for compensation fell "within the purview of the Act" and was "in accordance with law."

5. In holding that Armistead's employment was "not local," but was "maritime" and was so "concerned with commerce and navigation" that compensation could not validly be provided by State law. (Op. pp. 2-3, par. (2.)

6. In holding that "What we are called upon to decide is not of constitutional magnitude. For regardless of whether or not the limitation of the power set out in the Jensen case is to be accepted, it is not doubted that Congress could constitutionally have

provided for recovery under a Federal statute in this kind of situation" (Op. p. 4), and, that in the absence of the fundamental and jurisdictional requirement of the Act that the employee's contract of employment must be in "maritime" [Act, sec. 2 (4)] or that the fundamental and jurisdictional requirement do not exist, the employer could nevertheless constitutionally, in the absence of fault on his part, be subjected to the liability which the statute creates.

7. In holding from the evidence and under the Act that the deputy commissioner's finding that Armistead "was acting in the course of his employment was final," and that "The Circuit Court of Appeals should therefore have accepted it as final." (Op. p. 2, par. (1.)

8. In holding from the evidence and under the Act that "Armistead's death was the result of . . . an accident" which occurred at a place on navigable waters where he had not been employed, directed or requested, and required to be by his employer;—and this even though his contract of employment had only incidental relations to commerce and navigation and was of a local character, and "compensation or damages" could have been validly provided by State law without working material injury or prejudice to the characteristic features or uniformity of the admiralty law.

9. In holding that although no "legal representative" of Armistead, the decedent, has ever been appointed," and has never claimed or "elected to claim compensation under the Act, or to maintain an act on at law or in admiralty for damages on account of such injury, resulting in death," as is expressly pro-

vided in Sec. 5 of the Act (Op., pp. 5-6) that this "did not defeat the jurisdiction of the deputy commissioner to hear the claim made by the widow and to award her compensation; and that the claim having been filed by his widow and her capacity to file the claim having not been contested before the deputy commissioner or in the district court, the objection, even if otherwise meritorious, was too late"; and in further holding that the deputy commissioner, a purely administrative agent, who had no interest in this litigation, could, therefore, "in the name of the Attorney-General of the United States," file the petition in this Court for writ of certiorari to the decision of the Circuit Court of Appeals at the expense of the United States, and thus become the active partisan litigant,—was authorized by law and was a proper procedure in such cases and gave this Court the right to grant the writ and entertain it. And this, too, when neither the widow who filed the claim or other party in interest applied for the writ of certiorari or authorized the deputy commissioner to do so.

II.

Your petitioner further represents that the above holdings of this Honorable Court appear to be in conflict with all the uncontradicted evidence, the contract of employment between your petitioner the employer, and Armistead the employee, and with the instructions given him never to go on navigable waters, and with the former decisions of this Honorable Court, and are of transcendant importance to

every employer in the United States of janitors, porters, handy-men, chauffeurs, delivery men, and others of like character and class, who, under their contracts of employment, are "non-maritime" employees like Armistead was here (Op., top of p. 3; finding of Deputy Commissioner, R. 7), and who, as this Court held "was predominantly employed in maritime" (Op., top p. 3) wholly on **land,**— and whose duties were defined (R. 30-31, 35—Armistead's Social Security Card signed by him), and who was "cautioned" and particularly instructed "never to go upon or get in a boat on navigable waters" (Op. p. 2, par. 1), and had no authority from his employer or any other person to go on the river. (R. 38, 40, 45, 49, 51.)

III.

For this Honorable Court to now hold for the first time that such "non-maritime" employees can convert themselves into "maritime" employees and thus make themselves "longshoremen and harbor workers" within the purview of the Act, by going, "of their own accord" (R. 45), upon navigable waters in violation of their contracts of employment and in disobedience of their positive instructions, and thereby get injured or drowned while on navigable waters, will be for this Court to make every employer in the United States of such employees liable in "compensation or damages" under the Act and to extend the Act to all "non-maritime" employees,—a class entirely different from "longshoremen and harbor workers" for which class the Act was solely passed by the Congress of the United States.

IV.

It is further believed and respectfully represented that the Act was never intended by the Congress of the United States to accomplish such a far-reaching effect and to work such injury to all employers of such employees—whether they be porters, handymen or chauffeurs, etc., or to apply the Act **at all** to "non-maritime" employees who, under their contracts of employment, are employed to work wholly on land and "cautioned and instructed never to go on navigable waters" while engaged in doing any work for their employers, as is established by all the uncontradicted evidence (R. 38, 40, 45, 49, 51; Op., p. 2, par. 1.)

V.

The decision of your Honorable Court in your petitioner's case affects such a multitude of employers and employees, it is believed to be of universal interest and importance, and to merit a rehearing and reconsideration by this Honorable Court, not only to protect your petitioner's rights and interests, but to protect the rights and interests of all employers, whose rights to contract and property are seriously involved.

VI.

If the Act as so construed by this Honorable Court without limitation, makes your petitioner and all other employers liable to pay "compensation or

damages" to such "class" of employees as "janitors, chauffeurs, etc."—not employed as "longshoremen and harbor workers"—as it clearly appears to do (Op., top p. 3), then it is respectfully urged that the Act is unconstitutional and deprives your petitioner and all other employers of their inherent right to contract with and to hire their employees as "non-maritime" employees to work wholly on land and of the right to define their duties and to fix or prescribe the place or places where they shall work, and where not to work. If the statute as now so construed by this Court is declared to be the law it will render the Act unconstitutional and result in depriving all such employers of their contract rights and property without due process of law,—and this by conferring upon a single deputy commissioner of the United States the "final determination" of the existence of fact of employment upon which the enforcement of the constitutional rights of such employers depend, and will thereby also oust the constitutional courts of this nation of their jurisdiction. It is only now for the first time that employers are confronted with such a challenge—a challenge by deputy commissioners to ruin employers under the guise of "fact finding" with "finality." This is the first time in our national history when the doctrine that employers have no rights or that those rights may be violated by the holdings of deputy commissioners, the evidence disregarded, and that employers' rights need not be respected by them. (Pet. for writ p. 7, note 3.)

In view of the findings of the deputy commissioner in your petitioner's case disregarding the positive and uncontracted evidence and drawing "inference"

contrary thereto, there is little wonder that there is today so much distrust, dissatisfaction and strife in our national life resulting from awards made by such commissioners who partisanly draw inferences without evidence or contrary to evidence and make findings and reports affecting the contract rights, property and liberty of the citizen. Your petitioner and other employers and the country entertain for this and other constitutionally constituted courts the highest confidence and pursue their business from day to day in their efforts to make a living, pay taxes and support their government in the firm belief that this and the other courts of the United States will safeguard and protect their rights and render just judgments uninfluenced by selfish organizations, or their cohesive force.

VII.

It is further respectively submitted that the conferring upon such administrative agencies the power to find facts, within their proper province and within the purview of the Longshoremen's and Harbor Workers' Compensation Act, "does not require the conclusion by this Court that there is no limitation upon their powers"; nor does it require that it be held that they or the Congress of the United States can completely oust the courts of all determination of jurisdictional facts underlying the statute by vesting the authority to determine them **with finality solely in such deputy commissioner.** For this Court to so hold, as it appears to have done here (Op., p. 2, par. 1), "would be" as said by this Court "to sap the

judicial power of the courts as it exists under the Federal constitution and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do, upon the facts,—since finality as to such facts becomes in effect finality in law. **Crowell** v. **Benson** infra.

VIII.

Your petitioner further represents that the holding of this Honorable Court that the deputy commissioner's finding that Armistead was an employee in "maritime" employment and "was acting in the course of his employment" when drowned was supported by substantial evidence and was "final," and that "The Circuit Court of Appeals should therefore have accepted it as final" (Op., p. 2, par. 1),—simply because Armistead's death occurred on navigable waters (Op., top p. 3), is in direct conflict with the decisions of this Court heretofore rendered on the same question construing the same Federal statute.

In **Crowell** v. **Benson** (1932, 285 U. S. 22, 76 L. Ed. 598, 52 Supreme Court Rep. 285) this Court held at 292:

> The Act is "made to facilitate the exercise by the court of its jurisdiction to deny effect to any administrative finding without evidence, or, contrary to the indisputable character of the evidence . . . , or arbitrary in any respect."

Int. Com. Commn. vs. **Louisville R. R. Co.**, 227 U. S. at 91-92, 33 S. Ct. 185; **Tagg Bros. & Moorehead** vs. U. S., 280 U. S. 420, 50 S. Ct. 220."

Id. 295:

> "In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment the statute is open to the construction that the court in determining whether a compensation is in accordance with law may determine the fact of employment which underlies the operation of the statute. . . . "

That is exactly what the Circuit Court of Appeals did in your petitioner's case, viz., it determined that the award of the deputy commissioner was not supported by "substantial evidence" and was not "in accordance with law" as to the fact of Armistead's employment in "maritime."

Id. 297:

> "As the question is one of **constitutional** authority of the deputy commissioner as an administrative agent the Court is under no obligation to give weight to his proceedings pending the determination of that question."

Your petitioner submits with this petition his brief in support of each of his contentions as to the

holdings made by this Court in his case in further support of his reasons for filing it, where they will be set forth and compared with the holdings in the instant case.

Wherefore, your petitioner prays that his petition for a rehearing of the decision of this Court rendered herein on December 8, 1941, be granted and the case be reheard, reconsidered and reversed, and that the decision of the Circuit Court of Appeals rendered herein, reversing the award of the deputy commissioner and the decision of the District Court, be affirmed.

Respectfully submitted,

MOTOR BOAT SALES, INCORPORATED,
Petitioner.

By S. KING FULTON,
Its President.

MINITREE JONES FULTON,
Counsel for Respondent Petitioner,
1128 Mutual Building,
Richmond, Virginia.

CITY OF RICHMOND,
STATE OF VIRGINIA, to-wit:

S. King Fulton, being first duly sworn, on oath says that he is President of the Petitioner, Motor Boat Sales, Incorporated, whose name is signed to the foregoing petition; that he has read said petition and knows the contents thereof and that the same is

true to his knowledge, except as to matters therein obviously alleged on information and belief, and as to those matters he believes them to be true, and that he has been fully authorized by proper resolution of the Motor Boat Sales, Incorporated, to sign this petition for said corporation and to file the same on its behalf.

Subscribed and sworn to before me this, the 23rd day of December, 1941.

J. LANCASTER WATTS,
Notary Public for City of Richmond, Va.

My commission expires the 1st day of Nov., 1944.

CERTIFICATE OF COUNSEL

The undersigned, Counsel for the Petitioner, Motor Boat Sales, Incorporated, named in the above styled cause of E. V. Parker, Deputy Commissioner U. S. Employees Compensation Commission, Petitioner, v. Motor Boat Sales, Incorporated, October Term 1941, No. 46, hereby certifies that the above and foregoing petition for a rehearing is made, presented and filed in good faith and not for the purpose of delay; and is believed by such counsel to be meritorious.

M. J. FULTON,
Counsel for Petitioner.

December 30, 1941.

In The
Supreme Court of The United States

E. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER,

vs.

MOTOR BOAT SALES, INCORPORATED

OCTOBER TERM, 1941

NO. 46

RESPONDENT'S BRIEF IN SUPPORT OF HIS PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

In this brief we will discuss the reasons urged in respondent's petition for granting a rehearing and

re-determining the holdings (1), (2) and (3) of this Court set out in its printed opinion rendered herein on December 8, 1941.

> (1). **"The Circuit Court's conclusion that Armistead was not acting in the course of his employment." . . . "Granting that more than one possible conclusion could have been reached upon the evident, we think it was clearly sufficient to support the Deputy Commissioner's finding that Armistead was acting in the course of his employment."**

FIRST. THIS HOLDING APPEARS TO BE CONTRARY TO BOTH THE EVIDENCE AND LAW.

(A) Does the uncontradicted evidence sustain the above conclusion as the true or just one, which on its face shows that it is based upon an "inference" drawn contrary to the positive evidence quoted therein and that it is not "free from ambiguity and doubt?"

(B) Is the holding in accordance with the Longshoremen's and Harbor Workers' Compensation Act itself [Sec. 2(4)] and the former decisions of this Court, and the great weight of authority?

A.

(1) It is with great deference respectfully asserted that a re-examination and consideration of the testimony by this Court will show that **factually** the

"finding" of the Deputy Commissioner and the holding of this Court that, although Armistead "was predominantly a non-maritime employee" (Op. top p. 3), nevertheless, because he was drowned on navigable waters this "activity" of itself brought the case within the ambit of the Act.

The record will show that the holdings are not only without evidence to support them, but are contrary to the uncontradicted positive testimony, the contract of employment entered into between the employer, Motor Boat Sales, Incorporated, and the employee Armistead, as well as with the positive instructions given him by his employer. (R. 23, 37, 38, 40, 41-42, 45-46, 47, 49-50, appendix).

On this issue the finding of the Deputy Commissioner (R. 7), the holdings of the District Court (R. 55) and of the Circuit Court of Appeals [R. 69, 116 Fed. (2d) 791] that Armistead was employed by the Corporation as "a janitor, porter and handy-man at its store in the City of Richmond," and the holding of this Honorable Court in its opinion (top p. 3, par. (2) that "Armistead, hired primarily as a janitor and porter, **was predominantly a non-maritime employee.**" would seem to clearly establish the fact that Armistead was not "an employee in maritime" and did not fall within the purview, ambit or coverage of the Act [Sec. 2(4)], as held by the C. C. A., R. 69 at 71 to 78, 116 Fed. (2d) 791.

The above not only appears, but **an examination of the record will show** that all of the evidence is to the effect that Armistead had not **only** been employed as a "janitor, porter and 'non-maritime' employee," but that he had also been "cautioned and particularly

instructed" by his employer "never to go on or get in a boat located on navigable or any other kind of waters" (R. 37, 38, 40, 41-42, 45, 46, 47, 49-50, 51. (Appendix)—and that he violated his contract of employment, disobeyed his instructions and **departed from the place** where he was employed to work, and, "of his own accord" (R. 45), got into the boat owned by a third party, a Mr. Crown, and was taking a pleasure ride at the time the boat capsized and he was drowned.

In **Hyatt** v. **U. S. Rubber Reclaiming Co., Inc.**, 230 App. Div. 743, 243 N. Y. S. 474, citing **Erdberg** v. **United Textile Works**, 216 App. Div. 574, 216 N. Y. S. 275, the Court at page 475 said:

> "Disobedience of an order may do no more than to establish a fault on the part of an injured employee. In that case the employee would not lose his right to compensation. The order, however, may go further. It may so restrict the activities of the employee that its violation would place him outside of the sphere of his employment, in which case compensation would not be payable. The employee 'is beyond the sphere of his employment if he is injured in the course of doing the thing forbidden.'
>
> "The order or rule of the employer restricted the activity of the claimant: it excluded him from working on a machine in the mechanical department. When injured he was not doing that for which he was employed. He was performing an act not contemplated by

his employer under the rule which he says had been promulgated and of which he was informed. When doing the thing forbidden, he was outside of his employment."

The above holding is in accord with all the former Federal decisions on this question.

In **Hartford Acc. & Ind. Co.** v. **Cardillo,** 112 Fed. (2d) 11, the District Court of Appeals for the District of Columbia held that where the injury was caused by a personal quarrel between employees which had no relation to their work and that, therefore, the injury was not compensable, and held that an employee's employment and work had to require him to be at the place of danger and expose him to the risk or hazard, and that if it did not the injury would not "arise out of and in the course of the employee's employment." **Fid. Cas. Co. of N. Y.** v. **Burris** (1932), 61 App. D. C. at 230, 59 Fed. 1042 at 1044.

In **Leon Bruno** v. **Champlain Silk Mills,** 229 N. Y. 470, 128 N. E. 711, 13 A.L.R. 522, a leading case, it was held that in order for an employee to recover compensation under compensation acts "the work must bring the claimant within the range of peril by requiring his presence there when it strikes. Not that the act is in the line of duty or furthers the work, or creates special risks, but that the work brings (carries) the employee within its peril makes it, for the purposes of compensation, part of the work."

Armistead was not only not required to get in the Crown boat or go out on the river either by his contract of employment, but the duties he was as-

signed to do were defined, namely, "to help lift the motors from the trailer and carry them to the boat and then to help lift the motors from the boat back into the trailer and carry them to the shop. (Appendix.)

All the evidence shows that neither Armistead's contract of employment, nor the specific duties assigned to him on the day he was drowned, required him to go on the James River. They did not place him at the point of danger, or surround him with the danger, or place him on the Crown boat on the river in the presence of the act of peril which was the cause of his drowning. The "basic" thing required of the claimant under the Act was to establish by evidence introduced that Armistead's contract of employment, the specific duties which he was assigned to do, job or work required him to get into the Crown boat and to take the ride on the river or to be at the place where he was drowned when that boat capsized. **The claimant failed to offer any such evidence.**

Under the Act it is not sufficient to sustain the claim of the claimant **unless** the contract of employment of the injured employee, or the work he was ordered to do, required his presence on the boat of Crown on the river at the place and at the time the boat capsized and the danger struck.

Perils **arising from the departure** by an employee from his contract of employment or disobedience of instructions are independent causes and do not "arise out of and in the course of employment," but are matters outside of the contract of the employee's employment or job hazard.

(2) The Petition for the Writ of Certiorari filed by the Deputy Commissioner (p. 7, note 3) claims that he in making an award could disregard Armistead's contract of employment and the positive instructions given him not to go on navigable waters, and the evidence cited supra shows that he no doubt did disregard them, since all of it was to the effect that Armistead at the time he was drowned on James River in Crown's boat was in a boat and at a place he had not been employed, directed or required to be or go.

The **departure** of George P. Armistead, Jr., from his work and his getting into the boat of Mr. Crown, a third party, and taking a ride of his own accord upon the river was not only "local" and personal matter to him—and not concerned with commerce and navigation—but was a **departure** from his contract of employment and the place he was employed to work, and it was this act of his that created the peril and danger which caused his drowning.

(3) The opinion of this Court (p. 2) shows that its holding "(1)" was based entirely on "inferences." There this Court, after quoting the uncontradicted evidence of the President of the Corporation that "George was cautioned never to go into a boat or to have anything to do with a boat or motors," says:

> "Against whatever inference is to be drawn from the testimony regarding this generally and rather remotely announced rule, **are the 'inferences'** to be drawn from testimony that on the morning of the accident Armistead was sent to the river with **specific** instructions to

help Cooper in placing the outboard motors on the boat; that either Armistead or Cooper was told that Armistead was to go and help Cooper; that Cooper, the superior of the two employees, at least acquiesced in Armistead's remaining in the boat to keep a lookout for hidden objects in the muddy water; that Cooper regarded Armistead's acting as a lookout as 'helpful'; that employees of respondent would sometimes make trips in boats for testing purposes, in furtherance of respondent's business; and that in one instance an employee had taken a boat on a trip of at least fifty miles in respondent's behalf. Granting that more than one possible conclusion could have been reached upon the evidence" . . . etc.

An examination of the record shows that the above "inferences" drawn by this Court and upon which it predicates its conclusion are not only in conflict with the above quoted testimony of the President of the Corporation, but shows that those "inferences" are in conflict with all the positive testimony.

On this point, W. Earl Lloyd testified:

"Q. I will ask you if he (Armistead) was not sent down by his employer to assist in lifting two motors?

A. Yes, sir.

Q. Who went with him?

A. Johnny Cooper."

Randolph Hobbs testified:

"George Armistead at the time was instructed to go along to help lift motors from the car to the boat . . . to help load and unload them. (R. 36.) . . .

Q. You can state whether he was to go down to the river and what he was going for?

A. He was not instructed to go in the boat.

Q. At any time?

A. No, sir. (R. 37) . . .

Q. You did not tell him what to do on that day?

A. No, not particularly that day; but George was instructed not to go on boats and he was particularly instructed upon that. . . . that he did not 'have any authority or instructions to ride on navigable rivers or any other kind of rivers.' . . . He did not have any authority or instructions to ride on boats, perform any duties on navigable rivers or any other kind of rivers. (R. 38) . . . The purpose was for him to assist help take the motors and put them in the car from the shop . . . and out of the car on to the boat and back off the boat into the car and back to the shop. . . . and he left the store under those instructions. He had no authority or direction from anyone while there to go out on the river riding on a boat that was operated in deep water—or any kind of water (R. 40)—and he was instructed to help get the motors out of the trailer on to the boat and when done to reverse the pro-

> cedure. That was as far as your instructions went. (R. 41.) That George was not ordered and directed by Crown, the owner of the boat, or by Johnny Cooper to get into the boat and ride—that he had no work to do on the boat. (R. 41-42).

Cooper—whom this Court says in its opinion was the "superior of the two employees," and at least "acquiesced" in Armistead's remaining in the boat to keep a lookout for hidden objects in muddy water"—had no authority over the Crown boat, and no right to order Armistead not to get in Mr. Crown's boat, or to order him to get out. He testified (R. 45) "that he never gave him (Armistead) and never heard anybody else give him any duties to go on or to perform any duties on the water, and that he did not instruct George to get into the boat and that he never gave him and did not hear anybody else give him (George) any duties to go on the water, but that George got on the boat "of his own accord." (R. 45.)

There is no evidence in the record that Armistead was "the superior of the two employees," but, even if he were, the positive evidence of Cooper is that he **never** exercised any superiority over Armistead and that he never instructed, authorized, requested, or required him to get into the boat. There is not a scintilla of evidence that he had any authority to instruct him to get into the boat, or to "acquiesce" in his doing so, and thereby change Armistead's contract of employment and the positive instructions given him "never to go into a boat or have anything

to do with a boat on navigable or any other kind of waters." (Appendix.)

It is further respectfully urged upon this Honorable Court that the fact that George Armistead got into the boat "of his own accord" (R. 45), and that Cooper, who had no authority to instruct him to get on the boat, did not tell him to get off or order him off, does not warrant the "inference" drawn by this Court that Cooper had any authority to "acquiesce" in the unauthorized act of Armistead, and to thereby alter and change his contract of employment and "his positive instructions "never to go on to a boat." Simply because the water was muddy and that Cooper may or may not have regarded that George's sitting in the front of the boat with his face to the front looking out or ahead was helpful, **does not justify the "inference"** drawn by this Court, or its conclusion that, "Granting that more than one possible conclusion could have been reached upon the evidence, . . . we think it was sufficient to support the Deputy Commissioner's finding that Armistead "was acting in the course of his employment."

Especially is this true when all of the evidence shows that Armistead was acting in violation of his contract of employment and his positive instructions "never to go into a boat or to have anything to do with a boat on navigable or any other kind of water." Even if Cooper had told Armistead to get into the boat, or had "acquiesced" in his getting in and riding on the boat, or regarded that fact as helpful to him, it is submitted that such acts were beyond the scope of his authority, and could not make the employer liable for compensation, since the requirement of the

Longshoremen's and Harbor Workers' Act, Sec. 2(4) is that the injured employee **must** have been employed by his employer "in maritime employment" —hired to work on navigable waters or a dry dock— be a "longshoreman or harbor worker"—in order to bring such "employee within the purview of the Act and make the employer liable."

To the contrary, on this issue, all the evidence shows that Armistead was **not** "an employee in maritime"; that he had **no work to perform on boats or navigable waters,** and that neither his employment nor the work he was directed to do **required** him to be on the Crown boat or within the range or orbit of his peril—required his presence on the river or at the place and time he was drowned.—He was a "non-maritime employee" and was not ordered, requested or required to go on navigable waters.

It did not place him at the point of danger or surround him with the danger, or place him in the presence of the act or peril which was the cause of his drowning. The "basic" thing required of the claimant under the Act was to establish by evidence **introduced** that Armistead's contract of employment, job or work required him to go on and be present on the boat and at the place where he was drowned when the boat capsized. The claimant failed to offer such evidence.

(4) The Longshoremen's and Harbor Workers' Compensation Act has fundamental limiations:

> (a) It deals **exclusively** with "compensation or damages" and applies **only** when the accidental injury or death is of an employee

"in maritime" and "arises out of and in the course of his employment, in whole or part, "while such employee is engaged in performing the work he was employed and hired and required to do upon navigable waters of the United States, **"if recovery through workmen's compensation proceedings may not be validly provided by State Law."**

(b) The Act deals with the **job** hazards of "longshoremen and harbor workers" employed "in maritime" and only provides compensation for disability and death **of such class of employees.** It **does not provide compensation** for disability or death resulting from an injury to **"non-maritime employees upon navigable waters."**

This was shown by the report of the Committee on the Judiciary of the Senate of the United States, reporting bill (Senate Report No. 973, 69th Congress, 1st. sess., p. 16), now Longshoremen's and Harbor Workers' Compensation Act, said:

"If **longshoremen** could avail themselves of the benefit of state compensation laws, there would be no occasion for this legislation, but, unfortunately, they are excluded from these laws, **by reason of the character of their employment, . . . "** **Southern P. Co.** v. **Jansen,** 244 U. S. 205, 61 L. Ed. 1086, L. R. A. 1918 C, 37 S. Ct. 524, Annotated Cases 1917 E, 900, 14 N. C. C. A. 597; **Knickerbocker Ice Co.** v. **Stewart,** 253 U. S. 149, 64 L. Ed. 834, 11 A.L.R

1145, 40 S. Ct. 438, 20 N. C. C. C. C. A. 635; **Washington** v. **W. C. Dawson & Co.,** 264 U. S. 219, 68 L. Ed. 646, 44 S. Ct. 302, 24 N. C. C. C. A. 253.

The House Committee Report (House Rep. No. 1767, 69th Cong. 2d sess., page 20), said:

> "The principle of workmen's compensation has become so firmly established that simple justice would seem to require that **this class of maritime workers should be included in this legislation.** . . . "
>
> "The bill . . . will enable Congress to discharge its obligation **'to maritime workers'** placed under their jurisdiction by the Constitution of the United States. . . . "

Except as to the District of Columbia, the Longshoremen's and Harbor Workers' Compensation Act provides **no coverage** for non-maritime employees or for work both afloat and ashore in "an amphibious job." It does **not** apply to **non-maritime employment upon navigable waters,** since injuries occurring in the latter status, no doubt, may be validly compensated under a state law if it so provides.

The Act as thus created recognized what has become known in all the court decisions and to law writers as "The Local Exception Doctrine." It only provides compensation where the relation of the employer-employee exists **in maritime employment.** For this class of maritime employees it provides compen-

sation, and in this sphere is responsive to the concept of **maritime unity and is limited to the designated class of persons to whom compensation may be awarded by a commissioner.** The Act **only** confers jurisdiction upon him as to questions of fact, "arising" with respect to injuries of "maritime" employees "within the purview of the Act," and then **only** when the claim is supported by evidence showing it to be within the scope of his authority. An award to an injured "non-maritime employee," or whose injury did not "arise out of and in the course of his employment," or whose compensation "may be provided by state law, even though his injury should occur upon navigable waters, "is not in accordance with law."

Hence the Longshoremen's and Harbor Workers' Compensation Act does not apply to the "non-maritime" employment of Armistead, and to his injury at a place where he was not employed or required to be, even though his injury occurred upon navigable water. His employment and work were "non-maritime," did not require him to be where he was, and pertained to a matter purely "local"—not concerned with commerce and navigation.

In the instant case it is urged that this learned Court erred in holding:

1. That Armistead was "employed in maritime";
2. That his death "arose out of and in the course of the employment in maritime".
3. That the award of the Deputy Commissioner was final;
4. That no compensation could validly be provided by State law; and
5. That the mere "locality" of his injury on navi-

gable waters was sufficient to bring the case within the coverage of the Act and to give the Deputy Commissioner jurisdiction to make the award. (Op. top p. 3.)

The evidence and law do not support these holdings and they appear to be purely arbitrary.

This learned Court appears to have reached the above conclusions because the Act provides that the term "employer" includes an "employer any of whose employees are employed **in maritime** employment, in whole or part, upon the navigable waters of the United States," and that Armistead could recover, even though he was a non-maritime employee and his death did not arise out of and in the course of his employment, and State acts might validly provide compensation.

If Armistead was a non-maritime employee, or was not engaged in maritime work which required him to be present at the place he was when he was drowned, then he could not recover, even though the employer may have had some other employees employed in maritime,—and the evidence shows the "employer" did not have any employees "employed in maritime employment."

The Act does not authorize a commissioner to award compensation for injury to an employee **not "within the purview of the Act."** Such an award is not final. The mere locality of injury, therefore, is not sufficient to bring a case within the Longshoremen's and Harbor Workers' Compensation Act. Congress designed the Act to cover the "job hazards of maritime employees" while performing their work on navigable waters. The requirement is two-fold:

The employment and work required to be done must be "in maritime," and the injury must occur on navigable waters while the employee is engaged in the work he was hired and required to do.

On these points the Supreme Court of the United States, in **Crowell** v. **Benson** (Feb., 1932), 285 U. S. 22, 76 L. Ed. 598, 52 Sup. Ct. Rep. 285, Chief Justice Hughes, delivering the opinion, at page 287, said:

> "(1) First. The Act has **two limitations** that are **fundamental.** It deals exclusively with compensation in respect of disability or death resulting 'from an injury occurring upon the navigable waters of the United States' if recovery 'through Workmen's Compensation proceedings may not validly be provided by State law, and it applies only when the relation of master and servant exists. Sec. 3. 'Injury' within the statute, 'means accidental injury or death arising out of and **in the course of employment,**' and the term 'employer' means one 'any of whose employees are **employed in maritime employment** in whole or part' upon such navigable waters. Sec 2 (2) (4) 33 USCA. 902 (2, 4)."
>
> "As the Act relates **solely** to injuries occurring upon the navigable waters of the United States, it deals **with maritime law, applicable to matters that fall within the admiralty and maritime jurisdiction.** (Const. Art. 3, sec 2), citing cases."

The Supreme Court, at p. 271, said:

> "An award not supported by evidence in the record is not in accordance with law."

In the instant case, the record shows that the claim was "not within the purview of the Act," that the evidence did not support the findings and award of the Deputy Commissioner, and that the claim did not come within the scope of his authority.

This Court (p. 2, par. 1) appears to have reached the above conclusions in part at least on the ground: "that employees of respondent would sometimes make trips in boats for testing purposes in furtherance of respondent's business; and that in one such instance an employee had taken a boat on a trip of at least fifty miles in respondent's behalf." (Op. p. 2, par. 1.)

If Armistead was a "non-maritime employee" as this Court held (top p. 3) he was, or was not required by his employer to be present on the river or at the place he was drowned, then he could not recover even though the employer may have had some other employees employed "in maritime" or "non-maritime" employees who may have made trips in boats on the river,—and the evidence shows that none of its other employees were employees in "maritime employment," or that any of them ever made trips for Motor Boat Sales, Incorporated, in its own boats or "in furtherance of its business."

To the contrary, the evidence shows that the trips referred to in the opinion of this Court were made in other peoples' boats and "in furtherance of their

business" after the boats had been sold and delivered to such third persons. But even if such trips had been made, they would have been of purely a local character and might have been validly provided for by State law, as was Armistead's.

The further "inference" made in the opinion of this Court (p. 2) that "Cooper was a superior employee" to Armistead and that Armistead was sent to the river with instructions "to help Cooper operate the motor" on Mr. Crown's boat, or was subject to the orders of Cooper, is contrary to the evidence. There is no evidence that Cooper was the superior employee, or that Armistead on this or any other occasion was subject to the orders of Cooper either in or outside the store, or that Cooper requested, directed or required Armistead to get into Mr. Crown's boat and go riding on the river. To the contrary all the evidence shows that Armistead was sent to the river with specific instructions; his duties were defined. He was instructed to go on that trip to the bank of the river "to help lift those motors from the trailer to the boat and to help load them from the boat into the car—help load and unload them"—and Cooper specifically testified that he never on this occasion ordered or directed Armistead to get into the boat or gave him any instructions. (Apepndix.)

Todd, the manager of the store, and Lloyd, the mechanic, were George P. Armistead, Jr.'s, superiors, and not Cooper. (Appendix.)

William Crown, when asked if George P. Armistead, Jr., had any work to do on the boat, answered, "None at all," and that he was present when Armistead was told to go down with the motors, present

when he got down there, and that he never heard anyone tell George to get in the boat and ride. (Appendix 19.)

Johnnie Cooper testified:

> "Q. On that day, August 8, 1938, that Mr. Crown came by, what was George Armistead, the colored boy that was later drowned, what was he going with you down to the river for?
>
> "A. Take motor off the trailer and put it on the boat and take it off when finished.
>
> "Q. Did he have any duties in running a motor on out in the water?
>
> "A. Not to my knowledge.
>
> "Q. Did you instruct him to get in the boat or did he go of his own accord for a pleasure ride?
>
> "A. He went of his own accord. (R. 45.)
>
> . . . . . .
>
> "Q. You never gave him and you didn't hear anybody else give him any duties to go on the water?
>
> "A. Not to my knowledge." (Appendix 20-21.)
>
> "Q. He had no instructions to operate the boat on the river?
>
> "A. No, sir."

All the positive and uncontradicted testimony of Cooper is "that he **never** gave Armistead any instructions on that trip, that he never ordered him to get in the boat."

In **Crowell** v. **Benson, supra,** at page 292, it is said:

> "The Act "is made to facilitate the exercise by the Court of its jurisdiction to deny effect to any administrative findings without evidence, or, contrary to the indisputable character of the evidence . . . or arbitrary in any respect. **Interstate Commerce** v. **Louisville** R. **R. Co.,** 227 U. S. 88 at 93, 33 S. Ct. 185, 57 L. Ed. 431; **Tagg Bros. and Morehead** v. **U. S.,** 280 U. S. 420, 443-444, 50 S. Ct. 220, 74 L. Ed. 234."

The Supreme Court, at page 294 of that opinion, further said:

> "The determination of whether the claim was within the purview of the Act **are fundamental and jurisdictional in the sense that their existence is a condition precedent to the operation of the statutory scheme . . . these conditions are indispensable** to the application of the statute not only because the Congress so provided explicitly (Sec. 3), but also turns upon the existence of these conditions."

At page 295, the Supreme Court further said:

> "The Congress has not expressly provided that the **determinations by the Deputy Commissioner of fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be**

final. The finality of such determinations of the Deputy Commissioner is predicated primarily upon the provisions, (Sec. 19 (a), 33 USCA, sec. 919 (a), that he shall have full power and authority to hear and determine all questions in respect of such claim.' But 'such claim' is the claim for compensation under the Act and by its explicit provisions is that of an employee, as defined in the Act, against his employer. The fact of employment is an essential condition precedent to the right to make the claim. The other provision upon which the argument rests is that which authorizes the Federal Court to set aside a compensation order if it is 'not in accordance with law.' Sec. 21 (6) 33 USCA, sec. 921 (b). In the absence of any provision as to the finality of the determination by the Deputy Commissioner of the jurisdictional fact of employment, the statute is open to the construction that the Court, in determining whether a compensation order is in accordance with law, may determine the fact of employment which underlies the operation of the statute."

Id. 297, Sec. 64:

"As the question is one of the constitutional authority of the Deputy Commissioner as an administrative agent, the Court is under no obligation to give weight to his proceedings pending the determination of that question."

In Robinson on Admiralty, Chap. 3, p. 76, the latest text writer on the subject, the learned author says:

> **"Mere locality, therefore, is not enough to bring a case under the Longshoremen's and Harbor Workers' Act. Congress has made a statute designed to cover the job hazards of maritime workers while laboring on the water. The requirement is that maritime character in the work coincide with locality of the injury."**

At page 93, chapter 4, Workmen's Compensation Act, the learned author says:

> "(14) State Compensation Acts may apply to maritume injury if the matter is "maritime but local.'"

Id. p. 101:

> "THE 'MARITIME BUT LOCAL' DOCTRINE
>
> "14. The Supreme Court developed a doctrine that matters 'maritime but local' may be left to the states and by this exception many cases of maritime injury **lex loci** are compensable under state compensation acts. In 'local' matters uniformity is not required.
>
> "**The 'local aspect of the matter has been made to depend on the character of the injured man's work.** If the work is **maritime**, and the

locus also maritime, the state act is excluded from operation. For non-maritime workers the state act may apply even though the place of injury is in fact on navigable waters."

"The test for the exclusion of state acts was not whether or not the injury occurred upon the maritime waters. This would be clear-cut cleavage. The Supreme Court, however, now made the simple test of mere 'locality' of no avail."

Id. pp. 103-105:

"The nub of the 'local exception' doctrine, of course, lies in the court's definition of 'local.' 'Local does not have to do with locality; all the cases are those of an injury which is localized on the waters, not on the land. The definition has become bound up with the character of the man's work. By the mere test of locality the injury is maritime in all the cases. This is the common factor. The character of the work is the variant. If the work is 'maritime' the state compensation acts are excluded; if it is non-maritime, the state compensation act is applicable. The 'local' doctrine was explicitly set forth in Grant Smith-Porter Ship Co. v. Rohde. There the shipbuilder had launched a newly constructed ship, still in an unfinished state, undelivered and uncommissioned. But it was afloat in navigable waters when Rohde, who was at work on it as a carpenter or joiner in the builders' employ, was hurt. He sued in

admiralty, alleging the shipbuilding company's negligence. The employer relied upon the State Compensation Act. The court said: 'The contract for constructing the 'Aloha' was non-maritime and although the incompleted structure **was lying in navigable waters,** neither **Rohde's general employment nor his activities had any direct relation of navigation or commerce.** Under such circumstances regulation of the rights, obligations, etc., **by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law.'** Justice McReynolds referred to the Garcia decision and said: 'The **present case is controlled by that case's principle'** and 'this conclusion accords with **Southern Pacific Co.** v. **Jensen.'** Rohde's suit in admiralty failed and he was remitted to his remedy under the state compensation act. The thesis that if injury may be labeled 'local' the state law **is made applicable was thus established"** . . . (Act Sec. 3.)

Id. p. 106:

"From the authorities we deduce: . . .

(3) If an injury occurs on navigable waters and in the performance of a maritime contract, it is certainly within the exclusive jurisdiction of the admiralty unless (a) the contract is of merely 'local concern'; and (b) its performance has no direct effect upon navigation

or commerce; and (c) the application of the state law 'would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.' (4) State workmen's compensation laws, contractual in character, are applicable to maritime service on navigable waters, when and only when the service is within exceptions (a), (b), and (c) above. (5) If, however, the injury occurs on navigable waters, but in the performance of a non-maritime contract, it is, at least prima facie, local and within the operation of state laws. If there are any exceptions to this rule, they are yet to be developed."

Id. pp. 107-108:

"In the **Lake Gorian, Employers' Liability Assurance Co., Limited, of London, England,** v. **Cook,** the Fifth Circuit Court of Appeals had before it the injury of a man employed by the Ford Company **primarily** as a mechanic assembling automobile parts, which, as they came in on Ford ships, were unloaded by the employees of the assembling plant. Cook, while engaged in unloading, was injured on board one of the ships by what the court called 'pure accident,' so that, unless under the State Compensation Act, there was no recovery as for a maritime tort. The Circuit Court applied the State Act, saying: "We think . . . that

the matter of unloading these ships . . . at rare intervals was 'of mere local concern.'"

Id. p. 110: At the end of note 67, it is said:

". . . The Act does not apply to non-maritime employment upon navigable waters. Injuries occurring in the latter status no doubt may be validly compensated under a State law if it so provides."

Id. pp. 119-120:

"Knudson's Case, Crowell v. Benson, the Supreme Court distinguished 'jurisdictional facts' and excepted them from the administrative finality otherwise recognized.' What has been said thus far relates to the determination of claims . . . within the purview of the Act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the statutory scheme.' Should these conditions not exist, Chief Justice Hughes continued, 'there is no ground for the assertion that the person . . . in the absence of fault on his part be subjected to the liability which the statute creates.' For the application of the Harbor Workers' Act the workmen must be injured under the same conditions concerning locality which are required to be found as the basis of admiralty jurisdiction in tort generally."

At page 121, the learned author under the heading, "THE OCCUPATIONS WITHIN THE APPLICATION OF THE HARBOR WORKERS' AND LONGSHOREMEN'S ACT," said:

> "Not only must the locality be settled. **The man's occupation at the time of his injury must also be determined.**"

And at page 122:

> "The qualification is this: **even though the employee is injured while engaged in work on navigable waters,** his rights are to be determined under the state workmen's compensation act, if the enterprise upon which he is at the time **engaged is a purely local matter and not concerned with commerce or navigation . . . ."**

Od. p. 123:

> **"In re Herbert** Chief Justice Bugg for the Massachusetts Supreme Court held that the Compensation Act of the state was applicable in curious circumstances. Herbert worked on a scow, owned by the Coleman Disposal Company, and used to ferry garbage to an island two miles away in Boston Harbor. Herbert's job was to **sweep the scow** after its unloading, and he was at work while it tied up at the island when he fell overboard. **After reciting the standard** Supreme Court decisions the

> court said: 'It seems to us difficult to conceive of anything more local in its general nature . . . It does not appear that the deceased had any work directly connected with maritime affairs.'"

So it should have been held by this Court in the instant case, as it was in fact held by the Circuit Court of Appeals, 116 Fed. (2d) 791.

See also Id. pp. 131-132, 174:

> "There is no presumption in favor of jurisdiction, Ex parte Smith, 1876, 94 U. S. 455, 24 L. Ed. 207. It must affirmatively appear. Robertson v. Cease, 1878, 97 U. S. 646, 24 L. Ed. 1057."

"In Grant Smith-Porter Co. v. Rohde, (1927), 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321), to recover an award under a Workmen's Compensation Act from a shipbuilder for injuries which a carpenter received while he was working on an unfinished vessel moored in the Willamette river (a navigable river), the court held, the contract for constructing the vessel was non-maritime, and although the uncompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment nor his activities at the time had any direct relation to navigation."

In Alaska Packers' Association v. Industrial Accident Commission, 276 U. S. 467, 48 S. Ct. 346, 72 L. Ed. 656, a person engaged by a fishing and canning

company as a seaman, also as a fisherman, and then for general work and about a cannery, was injured after the fishing season was over while standing upon the shore and endeavoring to push a stranded fishing boat into navigable waters for the purpose of floating it to a nearby dock, where it was to be lifted out and stored for the winter. It was held that that injury, even if within admiralty jurisdiction, was of such a local character as to be cognizable under a state compensation law, a ruling which would not injure the characteristic features or uniformity of the admiralty law." So it should have been held here.

"In Sultan Railway Co. v. Department of Labor and Industries of the State of Washington, 277 U. S. 136, 48 S. Ct. 505, 72 L. Ed. 820, an award for injuries under the Workmen's Compensation Law of Washington . . . was sustained. The plaintiff was engaged in assembling saw logs in booms for towage elsewhere for sale, and the breaking up of the booms which had been towed on a river to a sawmill and the guiding of the logs to a conveyor extending into the river by which they were drawn into the mill for sawing. Clearly, even if this had any admiralty feature, it had only an incidental relation to navigation. The rights and obligations of the employees and their employers could well be regulated by local rules, which would not work material prejudice to the characteristic features of the general maritime law."

In South Chicago Coal & Dock Co., et al. v. Bassett, Deputy Commissioner, United States Employees' Compensation Commission, 60 Sup. Ct. Rep. 544, this Court held:

Syl. 1. "The general scheme of the Longshoremen's Compensation Act was to provide compensation to employees engaged in maritime employment, except as stated in the act, for disability or death resulting from injury occurring upon navigable waters of the United States, where recovery through workmen's compensation proceedings might not validly be provided by state law."

Syl. 8. "The purpose of the Longshoremen's Compensation Act was to provide compensation for a class of employees that worked on vessels in navigable waters, who although they might be classed as 'seamen' were regarded as distinct from 'members of a crew,' being employees whose service was that of laborers of the sort performed by longshoremen and harbor workers as distinguished from those employees on the vessel who were naturally and primarily on board to aid in her navigation.

"The question was required to be determined by the actual duties of the workman." (Syl 9.)

In Sultan Ry. Co. v. Dept. of Labor, Id. supra it was held that if the employee's work had any admiralty feature, it had only incidental relation to navigation, and that his rights and obligations of such employee and those of his employer could be regulated by local or State law without working

material prejudice to the characteristic feature of the general maritime law.

The opinion of this Court in the instant case appears to be in conflict with the above former decisions of this Court and has the effect of reversing them without referring to them.

B.

"Is the holding in accordance with the Longshoremen's and Harbor Workers' Act itself (Sec. 2(4)), and the former decisions of this Court, and the great weight of authority?"

This Court in its opinion, pp. 2 and 3, says:

"(2) The Circuit Court was of the opinion that even if Armistead had acted in the course of his employment, the Longshoremen's and Harbor Workers' Act would not apply because his employment was 'so local in character' that Virginia could validly have included it under a state workmen's compensation act. This proposition cannot be rested on the ground that Armistead, hired primarily as a janitor and porter, was predominantly a non-maritime employee. For habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made."

And on page 3:

> "If the conclusion of the Circuit Court can be supported at all, it must be on the basis that the employment, even though maritime and therefore within an area in which Congress could have established exclusive federal jurisdiction, it is nevertheless subject to state regulation until Congress has exercised its paramount power. Cf. **Liability Assurance Co.** v. **Cook,** supra, 237. Congress having expressly kept out of the area in which 'recovery . . . may . . . validly be provided by State law,' the argument may be made that Virginia would have been unhampered in providing for compensation here."

The above opinion of this Court, paragraph "(2)" holds that, "Armistead was predominantly an employee in maritime." The Deputy Commissioner also found (R. 7) that Armistead "sustained personal injuries resulting in his death, **while he was employed as a janitor and handy-man,**" as did the District Court (R. 55) and the Circuit Court of Appeals (at R. 71-72; 116 F. (2d) 791). This Court is therefore admittedly dealing with injuries resulting in the death of a "non-maritime" employee on navigable waters.

We have quoted above from the former decisions of this Court on that issue, and, viewing this case both factually and under the Longshoremen's and Harbor Workers' Act, Armistead seems clearly not to come within the coverage or ambit of the Act. The Deputy Commissioner was therefore without juris-

diction to entertain the claim,—since Armistead was "a non-maritime' 'employee and compensation for "non-maritime" employees under all the decisions, State and Federal, heretofore rendered, may be validly provided by State law.

The latest work (1940), Benedict on Admiralty, Sixth Ed., Vol. 1, at pp. 65-66 (Sec. 30), under the heading,

"WORKMEN'S COMPENSATION LAWS; INJURIES IN NON-MARITIME EMPLOYMENT ON NAVIGABLE WATERS"

says:

> **"Injuries received on navigable waters in the course of a non-maritime employment (such as the original construction or outfitting of a vessel though already launched) may be comprehended within a State workmen's compensation act, at least if it be of an elective character so that employer and employee contract with reference to State law."**

The learned author there, in Note 17, beginning bottom of p. 62 and in note 21, pp. 63-65, cites the leading State and Federal cases in which it has been held that "State compensation laws" are applicable to "non-maritime" employees,—such as this Court held in its opinion that Armistead was,—citing **State Ind. Comm. of the State of New York** v. **Nordenholt Corp.**, 259 U. S. 263, 66 L. Ed. 933, 42 Sup. Ct. Rep.

473, in which the Court, referred on p. 273 to the Jensen case, and said:

> "His employment was a maritime contract; the injuries which he received were likewise maritime, and the rights and jurisdiction of the Deputy Commissioner there were matters in the admiralty jurisdiction."

This Court there further said:

> "The doctrine that 'locality' is the exclusive test of admiralty jurisdiction in matters of tort has been questioned in the Inbrobeck case and show beyond any doubt that the maritime rules applied as to Jensen's injuries, we used the quoted language" (above).

This Court then, at p. 275, cited the case of **Grant-Smith-Porter Ship Co.** v. **Rohde,** supra, where a carpenter working on a vessel lying in the Williamette River (navigable water), sought and recovered compensation under the Oregon Workmen's Compensation (State) law, and said:

> "The accident occurred on navigable water and the case was of a kind ordinarily within the admiralty jurisdiction and neither the general employee's contract nor the workman's activities at the time had any direct relation to navigation or commerce—it was essentially a local matter—**and we said, under such circumstances regulation of the rights, obligations**

> and subsequent liabilities of the parties, as between themselves, by a 'local' rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations." Citing **Beach Fuel Company** v. **Garcia** to the same effect.

And at p. 276 this Court, concluding its opinion in the Garcia and Nordendyke cases, said:

> "There is no present Federal statute; and the application of the local law would not work material prejudice to any characteristic features of the general maritime law." Compare **N. Y. Central R. R. Co.** v. **Winfield** 244 U. S. 147; 37 Sup. Ct. Rep. 546, 61 L. Ed. 1045, L. R. A. 1918-C 439, Ann. Cases 1917-D 1139.

On p. 265, note 21, this Court cited **Miller's Indemnity Und.** v. **Brand,** 270 U. S. 59, 70 L. Ed. 470, 46 Sup. Ct. Rep. 194, and numerous other state cases. It then, referring to Maloney's case **(New Amsterdam Casualty Co.** v. **McManigal,** 1937, 87 Fed. (2d) 332 (C. C. A., 2d), said:

> "the local compensation act was allowed to apply to the injury of a carpenter engaged in building a lighthouse on a shoal in Lake Erie twelve miles from land."

Also see many other cases cited to the same effect

in Note 22, on page 66, including, **Jeffers** v. **Foundation Co.** (1936) 85, F. (2d) 24 C. C. A., (2d); **U. S. Casualty Co.** v. **Taylor,** 1933, 44 Fed. (2d), 521 (C. C. A. 4th), Certiorari denied, 290 U. S. 639.

The learned authority in Note 26 says:

> "It seems to be established that the Alaska cannery workers in small boats are engaged in 'local' work which may be covered by the California Workmen's Compensation Act: **Alaska Packers Assn.** v. **Marshall** (Nelson's and Erickson's Case), 95 Fed. (2d) 276 (C. C. A., 9th). Assuming that the work is "local," it would seem that the local (Alaskan) compensation law should apply."

It seems that the above former decisions of this and other Federal Courts in every respect similar to the instant case, decided on substantially the same evidence, facts and law, and the fact that Congress has never extended or attempted to extend the Longshoremen's and Harbor Workers' Act to "non-maritime" employees, whether their deaths occur on land or water, and especially where their employments are, as here, of a "local character"—such as janitors, porters, handy-men, chauffeurs, delivery-men and all others of a like kind or same class,—would be a sufficient answer to the holdings of this Court in the instant case and justify and merit a re-examination, reconsideration and re-determination of it.

Further, under the decision of this Honorable Court in the instant case,—**every employer in the United States of non-maritime employees may be held**

liable under the Longshoremen's and Harbor Workers' Act as now construed by this Court for compensation or damages, and this even though such non-maritime employees "of their own accord" (R. 45) go upon navigable waters and get injured or drowned, and even if they may have been "instructed and cautioned" as was admittedly the case here) "never to go on navigable waters or any other kind" while working for, driving the automobiles, trucks, delivery wagons and taking for their employers packages to the banks, landings or wharves on navigable streams.

The decision of this Court in the instant case is far-reaching in its holdings and implications, injurious to all employers of non-maritime employees, and of the greatest public interest.

3. PROCEEDINGS BEFORE DEPUTY COMMISSIONER AND THIS COURT, VOID.

This Court, Op. p. 5-6, says:

> "The respondent further contends that the award was void under Sec. 5 of the Act."

Sec. 2 of the Act 2(4) reads:

> "The term employer means an employer whose employees are employed in maritime employment, . . . upon the navigable waters of the United States."

Sec. 4(a) provides:

> "Every employer (whose employees are employed in maritime employment) shall be liable for and secure payment to them" (such employees) "of . . . compensation" . . . (Parenthesis supplied.)

Sec. 5 provides:

> "The liability of an employer prescribed in Sec. 4 shall be exclusive and in place of all other liability of (such) employer to (such) employee; his legal representatives . . . except that if an employer fails to secure employment of the compensation as required by this Act, his injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty on account of such injury or death." (Parenthesis supplied.)

It is thus seen that by the **express** language of the Act the only persons who can claim or "elect to claim" compensation under this Act or to maintain an action at law . . . on account of such injury or death, are: (1) the injured employee; or (2) "His 'legal representative' in case of death resulting from such injury" to such employee.

The Act **nowhere** authorizes the "widow" of a decedent employee "to elect to claim" compensation under this Act, or to maintain an action at law on account of the death of her **deceased** injured employee.

The issue now before this Court is: Does a United States Deputy Commissioner have any **substantive** or **administrative** power except such as is created and established by the L. S. & H. W. Comp. Act.

It is respectfully urged that a United States Deputy Commissioner has no power or jurisdiction except such as is conferred upon him by the Act; and as stated, supra, the Act of Congress expressly conferred in the Act the sole right to "elect and claim compensation under the Act, or to maintain an action at law, **only** upon two persons, viz.: an injured "employee" employed in maritime employment, or "his legal representative" in case of his death. In the instant case the record shows and it is admitted that Armistead, the employee, was dead; that no "legal representative of Armistead has ever been appointed." Here the claim was filed by his widow. (Op., p. 6.)

This is a case, therefore, where the jurisdiction of the Deputy Commissioner was created by statute and where the statute expressly—in terms—provides what persons may "elect" to claim "compensation under the Act," viz.: the injured employee, if he be living, or his legal representative in case of such employee's death, and the mode of acquiring and exercising that jurisdiction is prescribed by the statute. It is respectfully submitted that under all of the authorities dealing with this situation that a compliance with the express mandate of the statute by the only person authorized to elect to claim compensation under the act, or to maintain an action at law, are to be complied with, and this not having been done,—the proceeding is a nullity and the award of the Deputy Commissioner was void.

This Honorable Court has so held in all of its former decisions. See cases cited on pp. 81-85 of the Brief of the respondent, Motor Boat Sales, Incorporated, heretofore filed in this Court.

It is further well established that jurisdiction to institute a proceeding in the Federal courts and before administrative bodies created by the Acts of Congress, and the jurisdiction to hear and to determine claims or demands must exist before any award, decree or judgment therein can have any force or finality whatever.

The award of the Deputy Commissioner therefore, in the instant case was void **abinitio** and **in toto** for the failure of the "legal representative" of Armistead, the decedent, to "elect" and to file a claim or demand for compensation under the Act.

In every case instituted in a court there must not only be jurisdiction of the cause of action in the court, but there must be jurisdiction of the person instituting the suit. The suit must be brought by a person having the legal right, authorized by law,—in the manner prescribed in the Act, otherwise the award, judgment, or decree is void and should be set aside.

It would seem that these principles are so elementary and fundamental and have been so uniformly recognized by the Courts that the citation of authorities would be a work of supererogation. **Am. R. Co. v. Burch, 225** U. S. 547, 56 L. Ed. 879, 32 Sup. Ct. Rep 603, this Court, passing upon "a suit brought by the widow and son of a decedent," and not by his administration or legal representatives, it was contended that the widow and child being the sole beneficiaries might maintain the action without the ap-

pointment of a personal representative, and this Court

> "denied the contention and held that Congress, doubtless for good reasons, had specifically provided that an action under the Employers' Liability Act could be brought only by the personal representative; and the judgment was reversed without prejudice to the right of the personal representative."

In **Dennison** v. **Payne**, 293 Fed. 333, at 341, the Circuit Court of Appeals for the Second Circuit held:

> "And the law is equally well settled that if a court, officer or board has acted without authority in the premises, its decision is not merely voidable, but void, and affords no protection to those claiming under it."

It again, at p. 342, said:

> "The Federal Employers' Liability Act gives the right of action in case of death of one employed in Interstate Commerce 'to his or her personal representative.'"

Am. R. Co. v. **Burch**, supra, where the suit was instituted by the widow and son of the decedent as sole beneficiaries and not by the administrator, said:

> "The Supreme Court, however, held that the action could **not** be maintained, but could be brought **only** in the name of the personal

> representative, and reversed the judgment without prejudice to the personal representative."

So it should have been held by the Honorable Court in the instant case, for, as was said by this Court in the above case:

> "Congress, doubtless for good reasons, specifically provided that the claim or proceedings under the Longshoremen's and Harbor Workers' Act could only be brought by and in the name of the legal representative of the decedent employee in maritime."

The right of action created by the Act here was given **only** to the "legal representative" of the deceased employee. No such right is conferred by the Act upon his widow. This provision of the statute is mandatory. The fact that a claim was filed by the widow—a person not authorized by law to do so—and who had no right to "elect" or to make a claim for compensation under the Act, would not give the Deputy Commissioner jurisdiction or make valid any award rendered by him in her favor. A claim filed by such person and award made to her is void **abinitio** and **in toto.** Certainly the Deputy Commissioner of the United States, himself a creature of the statute, could not authorize the widow to make such election and file such claim; nor could such Deputy Commissioner by making forms, "SUCH AS CLAIM FOR COMPENSATION IN A DEATH CASE BY A WIDOW," confer upon her a cause of

action, or give her the legal right or authority to elect or to file such claim for compensation.

As was said in Montgomery's Manual of Federal Jurisdiction and Procedure, 3rd Ed., Sec. 92, at p. 73:

> "As to whether the case is within the scope of its jurisdiction, is a question which the court is bound to examine and determine, although not presented by the parties,—and even where they consent to a determination of the controversy on its merits. 'Consent cannot confer jurisdiction, and want of jurisdiction cannot be waived.' The same obligation rests upon a reviewing court; and on every court; and on every writ of error or appeal, the preliminary inquiry is to the jurisdiction (1) of the appellate court, and (2) of the court from which the record comes. And, inasmuch as a federal court is a court of limited jurisdiction, the fact that the case is one of which the court may take cognizance must appear affirmatively from the record,—otherwise a reversal must be ordered. 'Unless the contrary affirmatively appears,' a presumption will be indulged that a cause is not within the court's jurisdiction."

New England Nat. Bank v. **Calhoun,** (C. C. A., N. M.) 9 Fed. (2d) 272; **New York Life Ins. Co.** v. **Johnson,** (C. C. A., Iowa) 255 Fed. 958; **Perez** v. **Canadian Land & Fur Co.,** (D. C., La.) 14 Fed. (2d) 181; **McLaughlin** v. **Western Union Tel. Co.,** (D. C., La.) Fed. (2d) 177, 179; **King Iron Bridge Co.** v. **Otoe County,** (1887) 120 U. S. 225, 30, L. Ed. 623, 7 Sup.

> Ct. Rep. 552; **Highway Const. Co. v. McClelland,** (C. C. A., Mo.) 14 Fed. (2d) 406; **Rosenberg v. Shuler,** (D. C., Okl.) 289 Fed. 820, 821; **Danks v. Gordon,** (C. C. A., N. Y.) 272 Fed. 821; **O'Neill v. Co-operative League of America,** (D. C., Pa.) 278 Fed. 737.

The statement made in the opinion of this Court (Op. p. 6):

> "Since the respondent did not contest the widow's capacity to file a claim either before the Deputy Commissioner, or in the District Court, the objection, even if otherwise meritorious, was made too late." Cf. **McCandless v. Farland,** 293 U. S. 67."

even if true, it is submitted would not confer legal capacity on the widow (who had no lawful authority to file the claim), or on the Deputy Commissioner to entertain a claim made or filed by a person who had no lawful authority to do so—no cause of action; no right to elect or to assert a claim. Here, however, this Court also appears to be in error in making its above statement. For the record shows (R. 13) that the respondent **(under "Statement of Defense")** made

> "All the defenses that can be made under the act, or under the general issues where the facts are controverted."

And since, further, the Bill of Complaint filed in the

U. S. District Court (R. p. 2-3, par. 5), among other things alleged, top of page 3, . . . :

> "that the plaintiff employer gave notice to the Deputy Commissioner that the claim would be controverted and all defenses made under the Longshoremen's and Harbor Workers' Act, that could be lawfully made,"

and (R. p. 4, par. 7) said:

> "That the claim of claimant for compensation on account of the death of George P. Armistead, Jr., does not fall within the coverage of the Longshoremen's and Harbor Workers' Act; that he (the Deputy Commissioner) was without jurisdiction to entertain such claim" . . .

The decision of this Court in the instant case also raises a conflict with that of the Circuit Court of Appeals in **Chapman** v. **Griffith Consumers' Co.** (1939) 107 Fed. (2d) 263, where that Court held that the Act did not create "in the next of kin (widow) the right to maintain such action." There the suit was brought by an insurance company and by the "next of kin." Here it was brought by the widow, who had no more right to bring the suit than the "next of kin." This Court in its opinion (p. 5-6) is in conflict with this decision and apparently overrules it, without referring to it.

(4) CASES CITED IN OPINION OF THIS COURT NOT IN POINT

This Court, in its opinion, 3-4, refers to the case of **So. Pac. Co.** vs. **Jensen,** 244 U. S. 205, as if it were here in point and sustained its decision, and says it severs the link in the chain of reasoning "that Congress having expressly kept out of the area in which recovery may validly be provided by State law, the argument may be made that Virginia would have been unhampered in providing for compensation." This Court here overlooks the fact that Jensen's contract of employment was "in maritime" and that he was killed on a ship located on navigable waters where he had been set to work while performing the work he had been both employed and required to do. Consequently, his employment, work and the locus of his employment were all "maritime"; whereas, in the instant case, Armistead was employed as a janitor, porter or handy-man (R. 7, Finding of Deputy Commissioner), and, as was said by this Court, he "was predominantly a non-maritime employee" and was not hired, sent to or set to work on navigable waters. Under Jensen's contract of employment he was employed in "maritime employment" and set to work on navigable waters. In the instant case Armistead was a "non-maritime" employee employed to work on land, with instructions never to work on navigable waters.

In **Voehl** v. **Indemnity Insurance Co.,** 288 U. S. 162, cited in the opinion of this Court, at p. 2, as sustaining its ambiguous and doubtful holding that, "Granting that more than one possible conclusion

could have been reached upon the evidence," etc., the injury occurred in the District of Columbia, where the Act applied to injuries occurring both on land and water. There this Court held that there was no doubt of the power of Congress to invest deputy commissioners with authority to determine the question as to whether or not Voehl's injury arose out of and in the course of his employment. There this Court expressly held that the decision of that question determined on the general nature and scope of the employee's duties, the particular instructions he had received and the practice which obtained, and there was affirmative evidence to show that Voehl was injured in work he had been hired to do and had constantly and repeatedly done.

In the instant case, Armistead was not an employee in maritime within the purview of the Longshoremen's and Harbor Workers' Act. He was employed as a janitor and porter and, as this Court said, was predominantly a non-maritime employee, and had been particularly instructed never to go on navigable waters while doing any work for his employer, and he disregarded his contract of employment, his specific duties and the particular instructions he had received. It is therefore respectfully submitted that the Voehl case not only does not sustain this Court's holding, but it shows the very reverse, and that Armistead by reason of the fact that he violated his contract of employment, the specific duties he had been employed to do, and the instructions he had received was not entitled to recover.

The Northern Coal Co. v. **Straud,** 278 U. S. 142,

at 144, 49 Sup. Ct. Rep. 88, cited in the opinion of this Court at p. 3 as sustaining its decision is not in point. Strand was employed "in maritime" to work on vessels lying in navigable waters unloading them, and was killed while doing that "Longshoremen and Harbor Workers'" work on one of the vessels. There his contract of employment and the locus of his work and death were all on navigable waters and his work was "concerned" with navigation and commerce; whereas in the instant case Armistead was employed as a "janitor" and "porter" to work at the respondent's store and was "particularly instructed and cautioned never to work on navigable waters or any other kind," and, as was said by this Court in its opinion, "was predominantly a non-maritime employee," with no duties to perform on navigable waters or that required him to go thereon.

This is also true of the case of **Employers Liability Assurance Co., Ltd.** v. **Cook,** 281 U. S. 233, 236, 50 Sup. Ct. Rep. 308, cited in the opinion of the Court at p. 3. There Cook was employed as a steveadore to unload a ship lying in navigable waters, and this Court held "that he was a seaman within the meaning of the Jones Act, 41 Stat. 107, 46 U. S. C. A., Sec. 688," and that "Congress had occupied that field" and had thereby excluded all State legislation and said: "I am content to rest this case on that ground. It further said: " . . . I do not agree that the present case is so exclusively controlled by the maritime law that workmen otherwise in the situation of respondent, but who are not seamen and who therefore are not given a remedy by the Jones Act, and who are not within the purview of the Employers Liability Act

. . . . , are excluded from the benefit of a (State) compensation act like that of Texas," that is, the **State** may validly provide compensation for the **class** of employees not seamen or longshoremen and harbor workers, citing **Rosengrant** v. **Harvard,** 273 U. S. 664, and **John Baizley Iron Works** v. **Span,** 281 U. S. 222. This Court then cited the Harbor Workers' Act and said: "But the remedies given by that Act are **withheld** where recovery may be had under local compensation acts," as is the instant case.

This Court reaffirmed the doctrine of the Jensen case, supra, in **Knickerbocker Ice Co.** v. **Stewart,** 253 U. S. 149, and **Washington** v. **Dawson & Co.,** 264 U. S. 219, holding, as the Circuit Court of Appeals did in the instant case.

facts of the instant case, as disclosed by the record or the Longshoremen's and Harbor Workers' Act as construed by the Circuit Court of Appeals for this Court to reconsider either the factual findings of the C. C. A. or the constitutional principles imposed in the above cases of **Knickerbocker** v. **Stewart** and **Washington** v. **Dawson.**

> "(3) It is settled by our decisions that, where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations, and liabilities of the parties as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity. **Grant Smith-Porter Co.** v.

Rohde, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008; **Miller's Indemnity Underwriters** v. **Braud,** 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed. 470; **Alaska Packers' Association** v. **Industrial Accident Commission** (April 9, 1928) 276 U. S. 467, 48 S. Ct. 346, 72 L. Ed. 656."

A fortiori is this true where the employee is "non-maritime," and this Court held that Armistead "was predominantly a non-maritime employee" (Op. top p. 3), and the work has no "direct relation to navigation or commerce," but is "local" in character,—such as is the work of janitors, porters, handy-men, chauffeurs, delivery men, and the like. They clearly do not fall within the purview of the Longshoremen's and Harbor Workers' Compensation Act, and any injuries they may sustain in the course of their employment may validly be provided by State law without working any material prejudice to the essential features of the general maritime law or the Longshoremen's and Harbor Workers' Act. **Western Fuel Co.** v. **Garcia,** 257 U. S. 233, 242, 42 S. Ct. 89, L. Ed. 210; **Grant Smith-Porter Co.** v. **Rohde,** 257 U. S. 469, 477, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008; **Millers' Indemnity Underwriters** v. **Braud,** 270 U. S. 59, 64, 46 S. Ct. 194, 70 L. Ed. 470; **Sultan Railway & Timber Co.** v. **Department of Labor,** 277 U. S. 135, 137, 38 S. Ct. 505, 72 L. Ed. 820; **Baizley Iron Works** v. **Span,** at pages 230, 231 of 281 U. S., 50 S. Ct. 306; **Red Cross Line** v. **Atlantic Fruit Co.,** 264 U. S. 109, 44 S. Ct. 274, 68 L. Ed. 582.

It is respectfully submitted that this Court should

re-examine its decision in the instant case in the light of the facts disclosed by the record when compared with those in the Voehl case, in which two cases this Court has apparently made directly opposite holdings. (See par. 1 and 2 of the Voehl case).

Noguira v. **N. Y., New Haven & Hart. Co.**, 281, U. S. 138, is likewise not in point. There Noguira's employment was for loading freight into railroad cars on a float lying in navigable waters at a pier, and he was injured while he was engaged in performing the work he had been employed and ordered to do, which required him to go on navigable waters. Again the locus of the injury, the contract of employment and the work he was required to do and was performing were all in maritime. Here the facts are the very reverse.

The above cases are clearly not controlling here.

In concluding this brief, it is with great deference that a re-examination, reconsideration and re-determination of the decision of this Court in the instant case is asked by this,—one of the highest courts of all the world and a court of last resort,—for the reasons set out in the petition and in this brief and because the decision of this Court is so far-reaching and injurious that it affects all employers of non-maritime employees and renders such employers liable to such "class" of employees for compensation or damages occurring to them on navigable waters, who may go thereon in breach of their contracts of employment and in disregard and disobedience of the positive instructions which may be given to them "never to go on navigable waters." Until the decision

of this Court in the instant case employers had believed that the obligations of their contracts of employment with their employees made it the duty of such employees to perform the contracts and obey the instructions given them according to their terms, and that the Longshoremen's and Harbor Workers' Act was intended to recognize the **sanctity** of contracts and enforce their obligations and the duties imposed by them on the part of the employee as well as of the employer, and that the Act did not provide compensation sustained by a non-maritime employee for doing any act he had not been employed, directed or required to do and done in violation of his contract and the instructions given him.

Therefore, in the interest of your petitioner and all other employers of "non-maritime" employees, and the public and of the Federal Courts and the establishment of a uniform holding in accordance with the evidence and the Act and the public interest, a rehearing should be granted.

Wherefore, it is respectfully and earnestly prayed that this Court rehear, re-examine, reconsider and redetermine its decision and order of this Court made in petitioner's case on December 8, 1941, reversing the judgment of the Circuit Court of Appeals and affirming that of the District Court.

Respectfully submitted,

M. J. FULTON,
Counsel for Petitioner

Dec. 30, 1941.

ADDENDA.

ANALYSIS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT.

To come within the coverage of the Act the injured employee, or his legal representative in case of his death (Act sec. 5), must establish by evidence four conditions:

(1) That the injury or death "arose out of and in the course of his employment" (Act sec. 2(2),

(2) He must have been employed as a longshoreman or harbor worker by his employer to work in maritime in whole or part on a vessel engaged in commerce or navigation on the navigable waters of the United States (including any dry dock.) (Act sec. 2(3);

(3) His injury or death must have occurred under such circumstances "that compensation therefor may not validly be provided by State law" (Act sec. 3(a); and

(4) He must not be a master or member of a crew of a vessel, etc. (Act sec. 3(a), (1), (2), (b).

The Act makes the above four requirements "fundamental and jurisdictional"—conditions precedent—which must be established by evidence **before** any finding or award can be made by a United States deputy commissioner against an employer, and the findings of a deputy commissioner as to those "fundamen-

tal and jurisdictional facts" are not "final"; but, under Section 21 (a) and (b) of the Act, are made **subject to review** and determination by the Federal courts, which are expressly given the power to review and determine their existence for themselves, "based upon vidence submitted to those courts," and to "set aside" such order.

> Sec. 21(a) of the Act provides:
>
> "A compensation order shall become effective when filed * * *, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter."

> Sec. (b) provides:
>
> **"If not in accordance with law** a compensation order **may be suspended or set aside** in whole or part through . . . proceedings . . . brought . . . against the deputy commissioner making the order, . . . in the Federal District Court . . . in which the injury occurred. . . . The order of the Court . . . **shall** contain a specific finding, **based upon evidence submitted to the court."**

Is this power to be denied to the Federal courts?

The Act expressly confers upon the Federal courts the power to "review and set aside" the compensation order of a deputy commissioner, "if not in accordance with law."

It contains no express or implied limitation

upon the powers of the Court to review and set aside the compensation order if not "in accordance with law."

Crowell v. **Benson** (Knudsen's case) (1929) 33 F. (2d) 137 (S. D. Ala.), (aff'd. 1931) 45 F. (2d) 66 (CCA 5th), (aff'd. 1932) 285 U. S. 22, 76 L. (ed) 598, 52 S. Ct. 285; **So. Chic. Coal and Dock Co.** v. **Bassett, Dep. Comns.** (1939), 60 S. Ct. 544; **Massman Constr. Co.** v. **Bassett, Dep. Comnr.** (1940), 30 F. Supp. 813.

Act sec. 21(a) does not compel the Federal courts in reviewing the findings of the deputy commissioner to accept them or to be bound by the evidence introduced before the deputy commissioner or his finding or award in determining as to whether his compensation order is "in accordance with law." Crowell-Benson, 52 S. Ct. 295, 297.

The mandate of the Act is, that the Federal courts, if a proceeding is instituted within thirty days after the entry of the compensation order, may set aside "such order of the deputy commissioner," but that the Court's order so "setting aside" the finding of the deputy commissioner, **shall** "contain the specific finding, **based upon evidence submitted to the court.**

The Act and the former decisions of this Court clearly show that the Federal courts in reviewing and "setting aside" the finding or compensation order of a deputy commissioner are not bound by the evidence, his findings, or his compensation order,—but the courts may determine for themselves those "fundamental and jurisdictional" questions independently

of the finding of the deputy commissioner. If it does it is unconstitutional and deprives them of their rights and property without due process of law and of the judgment our Constitutional courts.

Mr. Justice Brandeis, in his dissenting opinion in the Crowell-Benson case supra, suggested that "a broader power of review" would follow the decision of this Court in that case, and gave some of the grounds for that review, and which grounds have since been reviewed and tried de novo by the courts, among which are the following, "wilful intent to injure," "injuries arising out of and in course of employment," **So. Shippg. Co.** v. **Lawson** (1939), 5 F. Supp. 321 (S. D. Fla.), "non-maritime employment," **Green** v. **Crowell** (1934), 69 F. (2d) 762 (CCA 5th) Certiorari denied 293 U. S. 554, 79 L. (ed) 656, 55 S. Ct. 88.

The compensation Act applies to "longshoremen and harbor workers." It makes no attempt to encroach upon State or local jurisdiction, but expressly provides, "if state law may be validly provided"—then the Federal Act does not.

The Jensen case does not "sever this link" (Op. p. 3),—because it was decided **before** the Act which placed the limitation laid down in Section 3(a) on the holding in the Jensen and **Knickerbocker Ice Company** v. **Stewart** cases (Op. p. 3 Note 2). Congress by Section 3 a) "severed the link in the chain of reasoning" in the Jensen case the other way round—in favor of "providing compensation by state laws wherever it might validly be so provided." Lex ita est.

Section 12 of the Act says "notice" of the death

of an employee may be given by any person—not that any person may file the claim or sue.

Section 19 of the Act is that the party authorized to "file the claim" or sue may do so "in accordance with regulations"—forms—"prescribed by the Commission"—not that the "widow" or any other unauthorized person may file the claim or sue and become the litigant. Deputy commissioners are right powerful as to making forms, but Congress has not yet given them the power to make or create causes of action or to take them away from those to whom Congress expressly gave them, or to legislate or amend the Statute by making forms or regulations.

Suffice it to say as to the McCandless Furland 293 U. S. 67 cited in the opinion of this court at page 6, that it is believed that a reexamination of it by this court will show that it never attempted to give a cause or right of action to file the claim or sue to a person who had none. There the party had the right or cause of action to sue; here the party filing the claim had no right to do so. The statute in direct and positive language created the cause or right of action and gave it to the "legal representative" of the deceased employee—not the widow or to any other than the "legal representative." It is believed that this court does not mean to hold that a deputy commissioner can deplete the Act and amend it or substitute the "widow" or any other person for the "legal representative." Yet, that is precisely the effect of the holding in the instant case—or can it be that this court intended its holding to be "ambiguous and doubtful," as the holding on page 1, (paragraph 1)

appears on its face to be; "Granting that more than one possible conclusion could have been reached, we think" . . . . . one of the conclusions "clearly supports" the finding—and to here give the "widow" the cause of action, and not the "legal representatives." It is not believed that this court intended to leave such an important substantial right open to such doubtful conclusion nor to take it away from the "legal representative" on whom Congress conferred the right to file the claim.

It may be that the failure to clearly present this view to the court was the fault of the writer of this brief who at the time of the oral argument was quite indisposed, and he assumes the fault of not making the issues and statute clear to the court and its importance to all litigants and to the Federal Courts.

MINITREE JONES FULTON,
Counsel for Petitioner.

Dec. 30, 1941.

APPENDIX

George W. Todd testified:

R. 22:

"Q. Whose boat was it in which they were riding there at the time?

"A. The boat belonged to Mr. W. M. Crown and his brother. . . .

R. 23:

"Q. How often would your employees go aboard a boat; every day?

"A. No, sir; not every day. It was just a rarity that we got on boats.

"We haven't got any business getting on other people's boats."

George W. Todd testified: (R. 23):

"It was just a rarity that we got on boats. We have not got any business getting on other people's boats" (R. 23).

W. Earl Lloyd testified: (R. 28-29):

R. 28:

"Q. You were in the shop the day he (Armistead) went down the river and was drowned?

"A. Yes.

"Q. I will ask you if he was not sent down by his employer **to assist in lifting two motors**?

"A. Yes, sir.

"Q. Wh went with him?

"A. J nny Cooper."

Randolph Hobbs testified, R. 34: That he was employed on August 8th, the day George Armistead was drowned. R. 35: That George was employed as a porter; that George filled out his social security cards and signed them, and that they stated that his position was that of porter. R. 36: George Armistead at the time was instructed to go along to help lift these motors from the car to the boat . . . and to help load and unload them" . . .

R. 37:

"Q. You can state whether he was to go down to the river and what (he) was going for?

"A. He was not instructed to go in the boat.

"Q. At any time?

"A. No, sir. (R. 37) . . .

R. 38:

"Q. You did not tell him what to do that day?

"A. Not particularly that day, **but George was instructed not to get on boats and he was particularly instructed about that.**

"Q. You said he was given particular instructions. Did he have any authority or instructions to ride on boats, or to ride on navigable rivers or any other kind of rivers?

"A. No, sir. . . .

"Q. He would have to get in the boat if his job was to lift it in the boat?

"A. Not particularly. The stern was pulled up on the shore and the motor was attached to it (R. 38).

BY MR. PARRISH:

R. 39:

"Q. Generally, the purpose was for him to assist in helping take the motors and put them in the car from the shop and out into the car and out of the car on the boat and back off the boat into the car and back into the shop?

"A. Yes, sir. . . .

"Q. He was purely in the capacity of a strong-arm man, to help the mechanic get it from land to water? . . .

"Q. And he left the store under those instructions. Had he authority or directions from you while there to go out on the river riding on a boat that was operated in deep water?

"A. Not any kind of water."

W. L. Lloyd, recalled, testified:

R. 40:

"Q. What did you tell George Armistead to do?

"A. " . . . George was instructed to help Johnny take it off the trailer and help put it on the boat, **but he was not instructed to ride in the boat.**

"Q. And he left the store under those instructions. He had authority or directions from you while there to go out on the river, riding on a boat that was operated in deep water?

"A. Not any kind of water." . . .

BY THE DEPUTY COMMISSIONER:

"Q. He was instructed to help get the motors out of the trailer on to the boat and when done to reverse the procedure?

"A. That is right. . . .

"Q. Was that as far as your instructions went; to take the equipment down and . . . bring it back?

"A. Yes; that is right." . . .

William Crown, one of the owners of the boat, testified:

R. 41:

That the boat was his brother's, but that he had charge of it at that time . . .took it on his trailer to the James River. . . .

"I don't know whether we got there first, or George or Johnny, and we took the boat and put . . . one end of it in the river and the other end on the bank . . . and George stands on the bank and lifts it in the boat." . . .

"Q. Was George Armistead directed by you or by Johnny Cooper, the boy that went with the Motor Sales down, to get into your boat and ride, or was he ordered and directed not to?

"A. Yes, sir."

R. 42:

"Q. Did he have any work to do on the boat?

"A. None at all.

"Q. You were there when he was told to go down with these motors?

"A. Yes, sir.

"Q. You were present when they got down there?

"A. Yes, sir.

"Q. And you never heard anyone tell George to get in the boat and ride?

"A. No, sir.

"Q. Was it your boat that capsized in the river when George got drowned?

"A. Yes, sir." . . .

John Samuel testified:

R. 45:

"A. George . . . was going down . . . to the river to help me.

"Q. Help you do what?

"A. Take the motor off the trailer and put it on the boat and take it off when finished.

"Q. Did he have duties in running a motor on out in the water?

"A. Not to my knowledge.

"Q. Did you instruct him to go in the boat or did he go on of his own accord, for a pleasure ride?

"A. He went on his own accord.

"Q. You were up there when you were told to take the motor down and he (George) went along to help unload the motors from the trailer and attach them to the boats and take them and put them back in the trailer?

"A. Yes, sir.

"A. And they were his sole duties?

"A. Yes, sir.

"Q. And you never gave him any and you didn't hear anybody give him any duties to go on water?

"A. Not to my knowledge."

R. 46:

"Q. When those motors were taken off the trailer and each one was attached to the boat, where was the motor of the boat?

"A. Sitting on the shore, like Mr. Crown said. . . .

"Q. At the time the accident happened who was driving the boat?

"A. I was driving the boat."

BY MR. PARRISH:

"Q. You did not tell George not to get in that boat on each occasion?

"A. No, sir." . . .

BY MR. FULTON:

"Q. You did not tell him to get in the boat?

"A. No, sir.

"Q. He had no instructions to operate the boat on the river?

"A. No, sir."

R. 47:

"Q. He had no instructions either way?

"A. No, sir."

BY MR. PARRISH:

R. 47:

"Q. He had no instructions either way?

"A. No, sir. . . .

"Q. You could handle it all right either by yourself or with somebody else?

"A. Yes, sir.

"Q. He did not do anything to assist you?

"A. No, sir; he did sit in the front and keep a lookout. . . .

"Q. Did you give him any orders to sit in front?

"A. No, sir.

"Q. There was a seat up front and he was sitting there?

"A. Yes, sir."

. . . . . .

R. 48:

"Q. Was it necessary for George to help hook them (batteries) up?

"A. I did it myself.

R. 49:

BY THE DEPUTY COMMISSIONER:

"Q. How often did you go down to work on the boat?

"A. Not very often. This was the first time I had been down for some time.

"Q. Did you go on other trips?

"A. I had a boat of my own.

"Q. Did you go for the Company on similar jobs and put a motor on a boat and test it out?

"A. Not that I remember.

"Q. This was the only time?

"A. Yes."

S. King Fulton, the President of the Motor Boat Sales, testified, R. 49, that he hired this boy, George Armistead, who was drowned on August 8, 1938:

"Q. What were his duties?

"A. He was a porter and operated under my supervision in December 1937.

"Q. Were his duties ever changed? . . .

"A. No, sir.

"Q. What instructions did you give him and other employees generally when they delivered things about going in other people's boats?

"A. George was cautioned not to go into a boat or to have anything to do with a boat or motors, as explained by Mr. Hobbs. . . . I laid the law down very rigidly in regard to that. I think everybody in the store knew my ruling . . . not to go out in a river or boats for anybody.

"Q. Was he employed to work on a boat?

"A. No, sir."

The above evidence stands uncontradicted in the record.

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SUPREME COURT OF THE UNITED STATES.

No. 46.—October Term, 1941.

E. V. Parker, Deputy Commissioner, United States Employees' Compensation Commission, Petitioner,
vs.
Motor Boat Sales, Incorporated.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 8, 1941.]

Mr. Justice Black delivered the opinion of the Court.

August 18, 1938, George Armistead was drowned when a motor boat in which he was riding capsized on the James River off Richmond, Virginia. The boat was navigated by one Johnnie Cooper. Both Armistead and Cooper were employees of the respondent, Motor Boat Sales, Incorporated, which sold small boats, maritime supplies, and outboard motors. The object of the ill-fated boat trip was to test one of the respondent's outboard motors, which it desired to sell, and later did sell, to the owner of the boat. The petitioner, Deputy Commissioner of the United States Employees' Compensation Commission, under authority of Section 19 of the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424, after complaint, investigation, and hearings, ordered the respondent to pay compensation to Armistead's widow for the benefit of herself and three minor children. Among the findings on which the Deputy based his order were these: that Armistead's death by drowning, "arose out of and in the course of his employment; that his death occurred upon navigable waters; and that at the time of his death he was engaged in maritime employment." Section 21(b) of the Act provides that if a Deputy Commissioner's award is not made in accordance with law, Federal District Courts may enjoin enforcement of it upon petition of any party in interest. In proceedings initiated by the respondent under this Section, the District Court sustained the award, dismissing the bill on the ground that the findings of fact were supported by evidence and were therefore conclusive, and that the Commissioner's conclusions and award were

in accordance with law. The Circuit Court of Appeals reversed, advancing two reasons for its conclusion: (1) Armistead was not acting in the course of his employment at the time of the accident; and (2) even if he had been, recovery was barred by Section 3(a) of the Act making compensation payable "only if . . . recovery for the disability or death through workmen's compensation may not validly be provided by State law."

(1) The Circuit Court's conclusion that Armistead was not acting in the course of his employment rests upon a revaluation of the evidence before the Deputy Commissioner. It is true that the respondent's president testified that "George was cautioned never to go into a boat or have anything to do with a boat or motor", but this rule was laid down "prior to November 1937" and the accident occurred in August, 1938. Against whatever inferences to be drawn from testimony regarding this general and rather remotely announced rule are the inferences to be drawn from testimony that on the morning of the accident Armistead was sent to the river with specific instructions to help Cooper in placing the outboard motors on the boat; that there were no specific instructions as to whether or not Armistead was to stay out of the boat; that either Armistead or Cooper was told that Armistead was "to go and help" Cooper; that Cooper, the superior of the two employees, at least acquiesced in Armistead's remaining in the boat to "keep a lookout" for hidden objects in the muddy water; that Cooper regarded Armistead's acting as lookout as "helpful"; that employees of the respondent would sometimes make trips in boats for testing purposes, in furtherance of respondent's business; and that in one such instance an employee had taken a boat on a trip of at least fifty miles in respondent's behalf. Granting that more than one possible conclusion could have been reached upon the evidence, we think it was clearly sufficient to support the Deputy Commissioner's finding that Armistead was acting in the course of his employment. The Circuit Court of Appeals should therefore have accepted it as final. *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162.

(2) The Circuit Court was of the opinion that even if Armistead had acted in the course of his employment, the Longshoremen's and Harbor Workers' Act would not apply because his employment was "so local in character" that Virginia could validly have included it under a state workmen's compensation act. This proposition

cannot be rested on the ground that Armistead, hired primarily as a janitor and porter, was predominantly a non-maritime employee. For habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity[1] that the award was here made. Cf. *Northern Coal Co.* v. *Strand*, 278 U. S. 142, 144; *Liability Assurance Co.* v. *Cook*, 281 U. S. 233, 236. Moreover, Section 2(4) of the Act expressly provides for its application to "employees [who] are employed . . . in whole or *in part* upon the navigable waters of the United States."

If the conclusion of the Circuit Court can be supported at all, it must be on the basis that the employment, even though maritime and therefore within an area in which Congress *could* have established exclusive federal jurisdiction, is nevertheless subject to state regulation until Congress has exercised its paramount power. Cf. *Liability Assurance Co.* v. *Cook*, *supra*, 237. Congress having expressly kept out of the area in which "recovery . . . may . . . validly be provided by State law," the argument may be made that Virginia would have been unhampered in providing for compensation here.

The decision of this Court in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, however, severs a link in this chain of reasoning. For under the holding of that case, even in the absence of any Congressional action,[2] federal jurisdiction is exclusive and state action forbidden in an area, which, although of shadowy limits,[3] doubtless embraces the case before us. The basis of the decision, that Article

[1] Cf. The Moses Taylor, 4 Wall. 411, 427; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58-63; Industrial Comm. v. Nordenholt Co., 259 U. S. 263, 272-273; Smith & Son v. Taylor, 276 U. S. 179, 181; London Co. v. Industrial Comm'n., 279 U. S. 109, 123, 125.

[2] While reference was made in the majority opinion of the Jensen case to § 9 of the Judiciary Act of 1789, 1 Stat. 76, 77, there is no implication that the Court regarded this statute as an "occupation" by Congress of a field otherwise of concurrent jurisdiction. And in Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 157-158, the Court explained the Jensen case entirely in terms of the exclusive federal jurisdiction created by Article III, § 2, and Article I, § 8, of the Constitution. Reference to § 9 of the Judiciary Act of 1789 was made only for the purpose of pointing out that a clause embodied in it, which saved certain common law remedies, "had no application."

[3] Cf.: "In view of these constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied." Southern Pacific Co. v. Jensen, *supra*, 216.

III, § 2, of the Constitution extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction" is tantamount to a command that no state may interfere with the harmony and uniformity of admiralty law, and that on the facts of that case recovery under a state statute would work such an interference, was rejected by four dissenting members of the Court. And when the doctrine of the *Jensen* case was reaffirmed in *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, and *Washington* v. *Dawson & Co.*, 264 U. S. 219, sharp disagreement was again expressed in dissenting opinions. We have not been called upon here, however, to reconsider the constitutional principles announced in those cases, and we are convinced that such a reconsideration is not necessary for disposition of the case before us.

What we are called upon to decide is not of constitutional magnitude. For regardless of whether or not the limitation on the power of states set out in the *Jensen* case is to be accepted, it is not doubted that Congress could constitutionally have provided for recovery under a federal statute in this kind of situation. The question is whether Congress has so provided in this statute. The proviso of Section 3(a) aside, there would be no difficulty whatever in concluding it has. For the Act expressly includes within its ambit accidents "arising out of and in the course of employment" in the case of employees engaged "in maritime employment, in whole or in part, upon the navigable waters of the United States", and Armistead's death was the result of such an accident. While the proviso of Section 3(a) appears to be a subtraction from the scope of the Act thus outlined by Congress, we believe that, properly interpreted, it is not a large enough subtraction to place this case outside the coverage which Congress intended to provide.

In the report of the Senate Committee on the Judiciary accompanying the bill which was enacted as the Longshoremen's and Harbor Workers' Compensation Act, S. R. 973, 69th Cong., 1st Sess. 16, this avowal of Congressional purpose appears:

"If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by reason of the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation can not, constitutionally, be enacted that will apply State laws to this occupation. (Southern Pacific Co. *v.* Jensen, 244 U. S. 205; Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149; Washington *v.* Dawson & Co., 264 U. S. 219.)

"It thus appears that there is no way of giving to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation without enacting a uniform compensation statute."

There can be no doubt that the purpose of the Act was to provide for federal compensation in the area which the specific decisions referred to placed beyond the reach of the states. The proviso permitting recovery where compensation "may not validly be provided by State law" cannot be read in a manner that would defeat this purpose. An interpretation which would enlarge or contract the effect of the proviso in accordance with whether this Court rejected or reaffirmed the constitutional basis of the *Jensen* and its companion cases cannot be acceptable. The result of such an interpretation would be to subject the scope of protection that Congress wished to provide, to uncertainties that Congress wished to avoid.

The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in Section 3(a) which would accord with the aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the *Jensen* line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence.

3) The respondent further contends that the award was void under Section 5 of the Act. This section, set out in full in the margin below,[4] states that "an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act . . . ." The record does

[4] "Sec. 5. The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, or anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

not indicate that a "legal representative" of Armistead was ever appointed. Here the claim was filed by his widow. Since the respondent did not contest the widow's capacity to file a claim either before the Deputy Commissioner or in the District Court, the objection, even if otherwise meritorious, was made too late. Cf. *McCandless* v. *Furlaud*, 293 U. S. 67. We may nevertheless point out that the widow's asserted incapacity to sue in her own name can be derived only inferentially from the terms of Section 5, and that other Sections of the Act are not in harmony with this inference. Section 12 provides that notice of death may be given "by any person claiming to be entitled to compensation for such death or by a person on his behalf." Section 19(a) provides that "Subject to the provisions of Section 13 a claim for compensation may be filed . . . in accordance with regulations prescribed by the commission", and there is nothing in Section 13 which makes filing by a "personal representative" mandatory. Moreover, administrative practice apparently countenances the filing of claims by widows since the commission has prescribed printed forms bearing the caption: "Claim for Compensation in Death Case by Widow and for Children under the Age of Eighteen." Form US-262.

We reverse the judgment of the Circuit Court of Appeals and affirm that of the District Court.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.